

IF NOT YOU, MR. PRESIDENT, WHO SPEAKS FOR THE COMPANY?

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I have worked with all sorts of witnesses over the past 25 years. Two types still scare me. The first is what I call the “just leave it to me” witness. This person finds it hard to believe that time must be spent in preparing for a deposition or even trial testimony when he or she is clearly smarter than everyone involved in the case including the lawyers, the jury and the judge. The other witness I fear is at the opposite end of the spectrum. This is the “I know I’ll lose the case” witness. Despite great preparation, this witness believes that giving testimony under oath will be both unbearable and the death nail for the case. I know how to prepare these difficult witnesses, but they still scare me.

One type of witness I no longer fear is the corporate representative or 30(b)(6) witness. 30(b)(6) is a Federal Rule of Civil Procedure that allows a party to identify subject matters or topic areas that must be answered by the company’s designated representative. When a 30(b)(6) Deposition Notice is served, the company “must designate one or more officers, directors or managing agents, or designate other persons who consent to testify” on behalf of the company. When served with a 30(b)(6) Notice, the first logical question is *Who Should Speak for the Company?* However, some other issues need to be explored before answering that question.

Most states have a Rule similar to the Federal Rule described above. Perhaps the most important factor to keep in mind is that the testimony of the corporate representative binds the company and may be used for any purpose at trial.

NEGOTIATE THE TERMS OF THE 30(B)(6) NOTICE

Often times, a 30(b)(6) Notice of Deposition requesting the testimony of a corporate representative will be served in draft form. Even when it is in final form, the terms are almost always negotiable. Because the Rule requires a party to “describe with reasonable particularity the matters for examination,” there may be disagreement over whether the matters to be covered have been clearly described or it may be argued that the topics are inappropriate in the context of the pending lawsuit. Also, beware of 30(b)(6) issues that are raised by way of letter, e-mail or Interrogatory. The other side may seek to “put you on notice” through these other forms.

Too often we spend our time focused on the procedure, i.e., Is the deposition going to be limited to the 7 hour rule in Federal Court? When and where are we going to take the deposition? Is it going to be videotaped? All of these things are subject to agreement, but this is the time to start negotiations on the substantive “topics.” You may also receive a Subpoena requesting documents to be produced at the deposition. Demand that the topics in the Deposition Notice and the documents in any subpoena are adequately described. Also object to topics requesting information that is easily obtainable from another source. If negotiations fail, you may need to seek a Protective Order.

DESIGNATE THE CORPORATE REPRESENTATIVE

One of the reasons that a 30(b)(6) deposition no longer scares me is because you get to preview the other side's questions by carefully reviewing and negotiating the terms set forth for examination. You also get to choose the person to testify on behalf of the company. The right person or persons will depend upon the topics designated. Although the designated topics will be different in every case, some of the more common areas include corporate governance, information technology, testing and safety procedures, training, company policies and procedures, relationships between entities and individuals and negotiations performed on behalf of the company.

We are seeing more and more 30(b)(6) depositions related to the storage of electronic information. Your company or client may have complete confidence in the IT person to answer those types of questions for the company. On the other hand, you might believe that the IT person will make a terrible witness. Remember, you can choose to designate someone else. Often times 30(b)(6) Notices cover multiple matters that cross lines of responsibility. Again, keep in mind that there is no obligation to designate only one representative. Multiple persons may be designated for differing subject matter.

So, *Who Should Speak for the Company?* Whomever you choose, understand that this person must not simply be a human body to speak on behalf of the corporation. There is a duty under the Rules and caselaw to designate someone that either knows the subject matter or has educated themselves about the noticed topics. Unlike a routine fact witness deposition, the answer "I don't know" can be lethal and a cause for sanctions against your company or client. So while the Rule does not require that you designate the "best" person, it does require that you designate and present an educated witness that can speak on behalf of the company and have answers for the topics to be covered. Interestingly, this does not have to be an officer or employee of the company. The Rule allows for the designation of any other persons who consent to testify on behalf of the company. This might include a retired officer or employee. It might include a consultant or some other trusted and loyal friend of the company. In-house and outside counsel should exchange information and thoughts about the best person to designate. Both will usually have perspectives that aid in the proper choice. Additionally, in-house and outside counsel can assist in educating and preparing the

designated person for the actual deposition.

Counsel and company management should discuss the deposition topics with the employees or other persons most knowledgeable about the specifics involved. You will now have enough information to make your designation.

EDUCATE THE WITNESS

Educating the corporate representative for deposition involves gathering and reviewing the necessary information about the subject matters designated in the Notice. **Caution:** *Avoid having corporate representative designees review privileged or otherwise protected documents that may be discovered at the time of deposition unless you are prepared to waive the privilege.* Review of privileged documents cannot always be avoided, but should be considered when gathering the information to be reviewed by the designated witness. Your representative may need to talk with other corporate employees or representatives to educate themselves about a specific topic or subject matter. Keep in mind that the 30(b)(6) witness does not speak based upon his or her "personal knowledge." He or she speaks for the corporation. In-house and outside counsel can assist in providing the designated witness with the relevant documents to review. This might include the topics from the Notice, certain pleadings, discovery responses or briefs. The company's internal documents, manuals, corporate structure or similar documents may need to be reviewed.

PREPARE FOR THE DEPOSITION

Preparation for the 30(b)(6) deposition incorporates many of the ideas referenced above but is a unique process unlike preparing a fact witness. It is important to prepare the witness to testify about facts, policy and opinion from the company's perspective. The witness should be counseled to distinguish between the company position and the individual's view of the world. At the deposition, the ground rules must be set with regard to the specific topics that the designated witness will be testifying about. Company counsel should always clear up any issues that might cloud the distinction between the individual as the company representative and the individual as a fact witness.

The dangers of an unprepared corporate representative are incentive to thoroughly cover things with your witness in advance. The company is bound by the testimony of an unprepared 30(b)(6) witness whose testimony may conflict with other company fact witnesses. The unprepared 30(b)(6) witness may reveal legal strategy

from in-house counsel and waive the work product or attorney-client privilege. The unprepared corporate representative may testify on matters outside of the designated topics in a way that damages your case.

Some type of mock deposition will prove useful after you have designated and educated a witness. You want to know (and help direct) how the company representative will answer the questions. The good news is that you already have an outline of the other side's questions in the Deposition Notice.

CONCLUSION

When a 30(b)(6) Notice or similar request is served and you have to determine *Who Speaks for the Company*, it is important to remember that it is a process. Negotiate, Designate, Educate and Prepare. These are the keys to a successful 30(b)(6) deposition. You no longer need to fear these depositions. There are actually advantages to defending a 30(b)(6) deposition. You get to choose the witness or witnesses. You know (and can limit) the topics to be covered in the depositions. Finally, it allows the company and its counsel to establish the company's position and plan a trial strategy around it.

There are many good sources for further reviewing 30(b)(6) deposition issues. A few are listed here for your reference:

1. "Picking and Preparing Your Corporate Witness for 30(b)(6) Depositions," *The Practical Litigator* (July 2002)
2. "Selecting and Preparing Corporate 30(b)(6) Witnesses," *The Metropolitan Corporate Counsel* (Volume 11, No. 9)
3. www.dri.org, search 30(b)(6) articles



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